In the Matter of the Proposed Amendment of ARM Title 17, chapter 8, Subchapter 7,
Pertaining to the Issuance of Montana Air Quality Permits

COMMENTS, ISSUES & OPTIONS

Comments were submitted by **US Environmental Protection Agency (EPA), Region VIII**; **Holland and Hart, LLP,** *representing Smurfit-Stone Container, Exxon Mobil Corp., Holcim USA Inc., Louisiana Pacific Corp., Stillwater Mining Company, and Imperial/Holly Sugar*; **Western Environmental Trade Association (WETA); Montana Contractors' Association (MCA)**; and **Montana Environmental Information Center (MEIC)**. A summary of issues, comments, options and suggested language for proposed amendments follows. ***The department's preferred options are listed as Option 1 under each issue.***

MAJOR ISSUES – EPA & OTHER COMMENTS

ISSUE #1: Purpose statement or preamble *(New Rule I)* *[included in 8/15/02 MAR notice #17-165]*

COMMENTS: ***[Proponents]*** The Board received comments supporting inclusion of the proposed preamble in New Rule I. These commenters stated that the preamble is necessary because it sets the framework for the proposed rule. Other regulations in Montana contain preambles or purpose statements, and it is appropriate to include this preamble in the air quality permitting rules. As a matter of policy, and considering the current budget crisis facing this state, an efficiently administered air quality permitting program is necessary, and it is appropriate to express this policy in the rules, themselves.

[Opponents] Another commenter stated that it would be inappropriate to include a provision in the rules stating that the rules will ensure that all applicable federal air quality regulations are met (New Rule I(1)(c)), so the provision should not be adopted.

OPTION 1 – remove preamble.

Response to comments: The Board has deleted the purpose statement, because the Secretary of State's office staff has indicated that purpose statements are inappropriate and unnecessary in administrative rules. Also, the manner in which the purpose statement is written makes it unclear whether or not its provisions are substantive. The statement of reasonable necessity included in the notice of proposed rulemaking sufficiently states the Board's rationale for adopting the new rules, and the purpose statement or preamble is unnecessary. Also, the proposed purpose statement could be interpreted as containing substantive requirements, such as the requirement that the program be administered to provide efficient allocation of resources for the benefit of all parties.

SUPPORT: DEQ, MEIC

~~RULE I PURPOSE OF AIR QUALITY PERMITTING (1) This subchapter shall protect public health and the environment by:~~

~~(a) clearly identifying regulated air pollution sources and activities;~~

~~(b) providing a predictable process whereby air pollution sources can commence construction and operation; and~~

~~(c) assuring all applicable state and federal air quality regulations are met.~~

~~(2) This program shall be administered so as to provide efficient allocation of resources for the benefit of all parties.~~

~~AUTH: 75-2-111, 75-2-204, MCA~~
~~IMP: 75-2-211, MCA~~

Note 1: If New Rule I is deleted, subsequent rules and internal references will be renumbered accordingly.

Note 2: If the preamble is eliminated, the board may include it in the final MAR notice as a statement of policy.

OPTION 2 - leave as proposed.

Response to comments: The Board has adopted New Rule I because it sets the ground rules for all decisions regarding the substantive rules. The scope and intent of the proposed rules cannot be fully understood without reference to New Rule I.

SUPPORT: Holland & Hart, MCA, WETA

OPTION 3 – eliminate New Rule I(1)(c) as suggested by MEIC.

Response to comments: The Board has adopted New Rule I because it sets the ground rules for all decisions regarding the substantive rules. The scope and intent of the proposed rules cannot be fully understood without reference to New Rule I. However, it would be inappropriate to include a provision in the state rules that specifies that the new rules will ensure that all applicable federal air quality regulations are met, so the Board has deleted proposed New Rule I(1)(c).

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ISSUE #2: Allow certain limited construction prior to issuance of a permit *(New Rule III)* *[included in 8/15/02 MAR notice #17-165]*

COMMENTS: ***[EPA]*** The U.S. Environmental Protection Agency (EPA) commented that it could not approve New Rule III (subsections (2)-(5)), which would allow certain construction activities prior to issuance of a permit. EPA commented that these provisions are inconsistent with Section 110(a)(2)(C) of the Clean Air Act and 40 CFR 51.160, including 40 CFR 51.160(b), which requires states to have legally enforceable procedures to prevent construction or modification of a source if it would violate any control strategies in the state implementation plan (SIP) or interfere with attainment or maintenance of the national ambient air quality standards (NAAQS).

EPA commented that the table provided to the Board, entitled "States Allowing Pre-Permit Construction," and which identifies several states with rules that allow pre-permit construction activities, does not support approval of New Rule III, subsections (2)-(5), into the SIP. EPA commented that three of the states (Idaho, Michigan and Utah) require administrative approval by the state before construction can begin (Idaho's DEQ issues written approval to the owner or operator that makes potential to emit limits requested by the owner or operator enforceable, Michigan's Commission may grant a waiver from the construction permit prior to full construction approval, and Utah's executive secretary issues an "approval order" (a permit) prior to construction). EPA commented that Minnesota's rule applies only to "de minimis" permit modifications (the rule includes pollutant thresholds for the criteria pollutants), and New Jersey's rule allows pre-permit construction only if not prohibited by Federal Law (N.J. Admin. Code 7-27-22.3(oo)(2)). EPA commented that Oklahoma's rule pertains to major source operating permits (Title V). The Oklahoma rules contain numerous restrictions and limitations to ensure that minor permit modifications do not violate any SIP control strategies or interfere with attainment or maintenance of the NAAQS (OAC 252:100-8-7.2(b)(1)(A)(I)(I-V). EPA commented that it planned to research the implications of the North Dakota rule.

[Holland & Hart] Another commenter supported the provisions. This commenter stated that Montana winters are long and the construction season is short. Industry should have the opportunity to conduct limited construction activities during the season while a permit is pending. The rule allows only limited construction and requires that a complete application already be submitted to the Department. The commenter stated that the applicant

undertakes the construction at its own risk, and the Department always retains the authority to halt the construction if it believes construction would violate any emissions standard or other rule.

[MEIC] Another commenter stated that the language allowing the Department to halt construction activity in New Rule III(3) would require the Department to prove that the proposed project would result in a violation of the SIP or would interfere with the attainment or maintenance of any federal or state ambient air quality standard and that irrefutable evidence would be impossible to establish. Instead, the provision should state that the Department may require cessation of construction if: "DEQ has reason to believe the proposed project may result in a violation of the SIP or may interfere with the attainment or maintenance of any federal or state ambient air quality standard."

OPTION 1 - leave as proposed.

Response to comments: The Board has adopted the rule as proposed. The construction season in Montana is relatively short, and facilities must pour concrete and undertake other construction while weather allows. Current rules prohibit any construction without first securing a permit, and the owner or operator has to timely secure that permit in order to meet its construction deadlines. While owners and operators should plan their permit applications accordingly, it is not unusual for issuance of a permit to be delayed beyond their control.

The new rule does not allow pre-permit construction if some other permit or rule prohibits such activities. For example, if a source needs a Prevention of Significant Deterioration (PSD) permit, both federal and state regulations require that the applicant secure the permit before undertaking any construction. Nothing in this rule would supersede these existing restrictions in other rules. The applicant would only be able to undertake limited pre-permit construction if it did not need a PSD permit as well. The applicant must have submitted an application and received a completeness determination from the Department prior to undertaking the construction. In addition, the Department has the ability to halt construction should it determine that the proposed project would result in a violation of the state implementation plan or would interfere with the attainment or maintenance of any federal or state ambient air quality standard.

At least seven states allow some form of limited pre-permit construction. Two of these states, Utah and North Dakota, are in EPA Region VIII.

EPA Region VIII has asked Montana to defer rulemaking on this issue until the matter is addressed on a national level as part of reform of the federal NSR rules. However, EPA has no plans at present to do so, and it may be years before the issue is addressed nationwide.

SUPPORT: Holland & Hart, MCA, WETA

OPTION 2 – remove provision.

Response to comments: The Board has deleted New Rule III(2) through (5). The Board agrees with EPA that this provision may not be approvable, because it would cause noncompliance with various federal statutes and regulations. The Federal Clean Air Act requires a major emitting facility to obtain a permit prior to commencing construction. Federal Clean Air Act, Section 165, "Preconstruction requirements," provides in part that: "No major emitting facility . . . . may be constructed in any area to which this part applies unless -- (1) a permit has been issued for such proposed facility in accordance with this part setting forth emission limitations for such facility which conform to the requirements of this part . . . ." Montana's permitting rules apply to both major and minor sources. 40 CFR 51.160 requires preconstruction permits for new sources or modifications, and 40 CFR 51.165(a)(1)(xvi)(A) specifies that preconstruction approvals or permits must be obtained prior to actual on-site construction. Federal Prevention of Significant Deterioration of Air Quality (PSD) permitting requirements allow states to provide certain exemptions from some PSD requirements, but not from the requirement to obtain a permit in advance of construction (40 CFR 51.166).

It is not appropriate to adopt a rule change that could endanger program delegation or place a facility in jeopardy of violating federal requirements while complying with state rules, resulting in possible enforcement action by EPA. It is better to wait until this question is answered on a national basis as part of EPA's ongoing review of the federal New Source Review (NSR) regulations.

SUPPORTS: EPA

RULE III MONTANA AIR QUALITY PERMITS--WHEN REQUIRED (1) remains the same.

~~(2) An owner or operator who has submitted an application and received a completeness determination from the department pursuant to [NEW RULE XI] may, prior to receiving a Montana air quality permit, initiate the following seasonal construction activities that, when completed, would have no anticipated increases in emissions of regulated air pollutants associated with them:~~

~~(a) installing concrete foundation work;~~

~~(b) installing below-ground plumbing;~~

~~(c) installing ductwork; or~~

~~(d) other infrastructure and/or excavation work involving the same.~~

~~(3) Notwithstanding the ability to undertake the construction activities described above, the department may issue a letter instructing the owner or operator to immediately cease such activities pending a final determination on an application if it finds that the proposed project would result in a violation of the state implementation plan or would interfere with the attainment or maintenance of any federal or state ambient air quality standard.~~

~~(4) Nothing in (2) obligates the department to issue a Montana air quality permit. An owner or operator who has received a completeness determination and who elects to engage in initial construction activities accepts the regulatory risks of engaging in such activities. The owner or operator acknowledges that the department may subsequently order cessation of initial construction activities, ultimately decline to issue a Montana air quality permit, or issue a permit that diminishes or renders useless the value of work completed prior to permit issuance. In voluntarily choosing to engage in such activities while knowing of these risks, the owner or operator agrees that, in the event the department seeks injunctive relief to halt or prohibit construction, no irreparable harm has resulted in any way to the owner or operator from these activities.~~

~~(5) The provisions of (2) do not supersede any other local, state, or federal requirements associated with the activities set forth therein.~~

OPTION 3 – add language suggested by MEIC.

Response to comments: The Board has adopted the rule with the suggested amendments to New Rule III(3). The construction season in Montana is relatively short, and facilities must pour concrete and undertake other construction while weather allows. Current rules prohibit any construction without first securing a permit, and a source has to timely secure that permit in order to meet its construction deadlines. While sources should plan their permit applications accordingly, it is not unusual for issuance of a permit to be delayed beyond their control.

The proposed rule does not allow pre-permit construction if some other requirement prohibits such activities. For example, if a PSD permit is required for a source, both federal regulations and state rules require that the applicant secure the permit before undertaking any construction. Nothing in this rule would supersede these existing restrictions in other rules. The applicant would be able to undertake limited pre-permit construction only if it did not need a PSD permit as well. The applicant must have submitted an application and received a completeness determination from the Department prior to undertaking the construction. In addition, the Department has the ability to halt construction should it determine that the proposed project would result in a violation of the SIP or would interfere with the attainment or maintenance of any federal or state ambient air quality standard.

At least seven states allow some form of limited pre-permit construction. Two of these states, Utah and North Dakota, are in EPA Region VIII.

EPA Region VIII has asked Montana to defer rulemaking on this issue until the matter is addressed on a national level as part of reform of the federal NSR regulations. However, EPA has no plans at present to do so, and it may be years before the issue is addressed nationwide. So, the Board has adopted the new rule.

However, the Board agrees with the commenter that the Department should not have to prove that a proposed project would result in a violation of the SIP or would interfere with the attainment or maintenance of any federal or state ambient air quality standard, in order to halt construction. This is an unreasonable burden, considering that the Department would have to rely on projections. Irrefutable evidence would be impossible to establish. Instead, the Department should be able to stop construction if it has reason to believe that the proposed project may result in a violation of the SIP or may interfere with the attainment or maintenance of any federal or state ambient air quality standard, and the Board has made this revision.

SUPPORTS: MEIC

RULE III MONTANA AIR QUALITY PERMITS--WHEN REQUIRED (1) and (2) remain the same.

(3) Notwithstanding the ability to undertake the construction activities described above, the department may issue a letter instructing the owner or operator to immediately cease such activities pending a final determination on an application if it ~~finds~~ has reason to believe that the proposed project ~~would~~ may result in a violation of the state implementation plan or ~~would~~ may interfere with the attainment or maintenance of any federal or state ambient air quality standard.

(4) and (5) remain the same.

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ISSUE #3: Conditional exemption for emergency equipment *(New Rule IV(1)(f))* *[included in 8/15/02 MAR notice #17-165]*

COMMENTS: ***[MEIC]*** A commenter stated that owners and operators should plan for emergencies. Simply allowing them to avoid planning for those emergencies because they occurred suddenly is unacceptable. The burden should be on the owner or operator to prove that they were unable to predict the emergency event that resulted in increased air pollution. The Department would then have discretion to determine whether the facility should have planned better, and whether the failure to plan had an impact that deserves an enforcement action. Predicting the future is not perfect but it should be encouraged. Likewise, the failure to even attempt to reasonably foresee possible emergencies should be discouraged.

[Holland & Hart] Another commenter supported removal of this language. The commenter stated that the remainder of the rule makes it clear that the exclusion is narrowly drawn and available only when the loss of power "causes, or is likely to cause, an adverse effect on public health or facility safety." Asking a facility to also demonstrate that it could not have reasonably predicted the emergency is too burdensome and could further jeopardize safety. In an emergency situation, the owner or operator needs to take the steps necessary to secure the facility, not worry about whether they are first required to obtain a permit.

OPTION 1 – remove exemption.

Response to comments: The Board has not adopted proposed New Rule IV(1)(f). The proposed rule, without the conditional exemption, would allow the Department to take enforcement action against an owner or operator who installs equipment under this provision and uses it in non-emergency situations. This exclusion is narrowly drawn and available only when the loss of power "causes, or is likely to cause, an adverse effect on public health or facility safety." Asking the owner or operator to also demonstrate that they could not have reasonably predicted the emergency is too burdensome and could further jeopardize safety. In an emergency situation, the owner or operator needs to take the steps necessary to secure the facility, not worry about whether they are first required to obtain a permit. An exemption from permit requirements for emergency equipment in situations when the owner or operator could have predicted the event causing the emergency would require reassessment of permitting determinations potentially years after they have been made.

SUPPORT: DEQ, Holland & Hart, MCA, WETA

RULE IV MONTANA AIR QUALITY PERMITS--GENERAL EXCLUSIONS
(1) A Montana air quality permit is not required under [NEW RULE III] for the following:
(a) through (e) remain the same.
(f) emergency equipment installed in industrial or commercial facilities for use when the usual sources of heat, power, or lighting are temporarily unobtainable or unavailable and when the loss of heat, power, or lighting causes, or is likely to cause, an adverse effect on public health or facility safety. Emergency equipment use extends only to those uses that alleviate such adverse effects on public health or facility safety. ~~A permit is not required for emergency equipment as long as the facility was unable to reasonably predict the event that caused the emergency;~~
(g) through (k) remain the same.

OPTION 2 - leave as proposed.
Response to comments: The Board has adopted the proposed conditional exemption language. Owners and operators should plan for emergencies. Simply allowing them to avoid planning for those emergencies because they occurred suddenly is unacceptable. The burden should be on the owner or operator to prove that they were unable to predict the emergency event that resulted in increased air pollution. The Department would then have discretion to determine whether the owner or operator should have better planned and whether the failure to plan had an impact that warrants an enforcement action. Predicting the future is not perfect, but it should be encouraged. Likewise, the failure to even attempt to reasonably foresee possible emergencies should be discouraged.
SUPPORTS: MEIC

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ISSUE #4: Exemption for drilling rig stationary engines and turbines that don't have the potential to emit more than 100 tons per year *(New Rule IV(1)(i))* *[included in 8/15/02 MAR notice #17-165]*
COMMENTS: ***[MEIC]*** A commenter stated that it is illogical to exempt any facility from permitting requirements that has a potential to emit more than 25 tons per year. This is not fair to all of the other facilities that have the potential to emit between 25-100 tons per year.

OPTION 1 - leave as proposed.
Response to comments: The Board has adopted the rule subsection as proposed. This provision is found in the existing rules, and the proposed rule makes the provision even more stringent than the existing rule, which has been approved by EPA.
SUPPORTS: DEQ

OPTION 2 – remove exemption [new proposal by MEIC].
Response to comments: The Board agrees and has stricken this exclusion.
SUPPORTS: MEIC

RULE IV MONTANA AIR QUALITY PERMITS--GENERAL EXCLUSIONS (1) A Montana air quality permit is not required under [New Rule III] for the following:
(a) through (h) remain the same.
(i) ~~drilling rig stationary engines and turbines that do not have the potential to emit more than 100 tons per year of any pollutant regulated under this chapter and that do not operate in any single location for more than 12 months;~~
(j) through (k) remain the same.

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ISSUE #5: De minimis *(New Rule V).* Specific changes requested by EPA are:
(1) Change 15 to 5 tons per year in **New Rule V(1)(a)**.
(2) Change wording in **New Rule V(1)(a)(i)** to include "any statute" and "the SIP" with other requirements that can't be violated.
(3) Change "startup or use" to "construction" in **New Rule V(1)(d)**.

(4) Change wording in **New Rule V(2)** regarding the placement of the phrase “emission limits or production limits in lieu of emission limits”; add “BACT/LAER requirements for major or minor sources” to requirements that can’t be violated; and delete “Conditions in the permit establishing emission limits, or production limits in lieu of emission limits, may be changed or added under (1)(a), if the owner or operator agrees to such changes or additions.”
(5) State should submit information regarding basis for exemption and demonstrate compliance with NAAQS.

COMMENTS: ***[EPA]*** EPA commented that New Rule V could allow violations of major and minor source preconstruction permitting requirements, as well as the SIP.

[Holland & Hart] Another commenter stated that the de minimis rule (ARM 17.8.705(1)(r)) was incorporated, as it currently exists, into New Rule V. The Board should not change the proposed new de minimis rule, which merely restates the existing rule, which was adopted after intense public participation and debate.

OPTION 1 - leave as proposed.

Response to comments: The Board has adopted the rule as proposed. In its 1999 de minimis rulemaking, the Board submitted a response to EPA's concerns that may be summarized as follows: "The de minimis rule would not allow violations of major source permitting requirements. The rule contains a provision, ARM 17.8.705(1)(r)(i)(B), that specifies that any construction or changed conditions of operation at a facility that would constitute a modification of a major stationary source is not considered a de minimis action." The Department is awaiting EPA's final action on the previously submitted de minimis rule, which is not being significantly changed in this rulemaking. The rule also contains provisions that do not allow violation of applicable ambient air quality standards or other rules.

SUPPORT: DEQ, Holland & Hart, MCA, WETA

OPTION 2 - make some of the changes requested by EPA.

Response to comments: The Board has adopted the rule with amendments to New Rule V(1)(a)(i) and (2). The Board believes that a de minimis rule is appropriate. In its 1999 de minimis rulemaking, the Board submitted a response to EPA's concerns that may be summarized as follows: "The de minimis rule would not allow violations of major source permitting requirements. The rule contains a provision, ARM 17.8.705(1)(r)(i)(B), that specifies that any construction or changed conditions of operation at a facility that would constitute a modification of a major stationary source is not considered a de minimis action." The Department is awaiting EPA's final action on the previously submitted de minimis rule, which is not being significantly changed in the proposed rulemaking. The rule also contains provisions that do not allow violation of applicable ambient air quality standards or other rules.

The rule applies only to projects that do not require a preconstruction permit, therefore a 10-day notice prior to startup or use is adequate.

The Board agrees that it is appropriate to clarify that changes to emission limits may not violate any statute, rule or the SIP. However, the Board does not believe it is necessary to separately identify best available control technology/lowest achievable emission rate (BACT/LAER) requirements for major or minor sources, because they are included in the rules and the SIP, which already are cited in New Rule V(2).

The rule states that de minimis changes may not cause or contribute to a violation of any Montana ambient air quality standard (MAAQS) or NAAQS, and this demonstration must be made with any de minimis change. Also, the Department has ample computer modeling from previous projects (that were submitted to EPA), that were much larger than the de minimis level of 15 tons, clearly demonstrating compliance with the MAAQS/NAAQS.

SUPPORTS: DEQ

RULE V MONTANA AIR QUALITY PERMITS--EXCLUSION FOR DE MINIMIS CHANGES (1) A Montana air quality permit is not required under [NEW RULE III] for de minimis changes as specified below:

(a) remains the same.

(i) any construction or changed conditions of operation at a facility that would violate any condition in the facility's existing Montana air quality permit, ~~or~~ any applicable rule contained in this chapter, or the state implementation plan is prohibited, except as allowed in (2);

(ii) through (e) remain the same.

(2) A Montana air quality permit may be amended pursuant to [NEW RULE XV], for changes made under (1)(a)(i) that would otherwise violate an existing condition in the permit. Conditions in the permit concerning emission limits or production limits in lieu of emission limits, control equipment specifications, operational procedures, or testing, monitoring, record keeping, or reporting requirements may be modified if the modification does not violate any statute, rule, or the state implementation plan. ~~Conditions in the permit establishing emission limits, or production limits in lieu of emission limits, may be changed or added under (1)(a),~~ and if the owner or operator agrees to such changes or additions.

OPTION 3 - make all of the changes requested by EPA.

Response to comments: The Board agrees with EPA's comments and has made the suggested changes to New Rule V.

SUPPORT: EPA, MEIC

RULE V MONTANA AIR QUALITY PERMITS--EXCLUSION FOR DE MINIMIS CHANGES (1) A Montana air quality permit is not required under [NEW RULE III] for de minimis changes as specified below:

(a) Construction or changed conditions of operation at a facility for which a Montana air quality permit has been issued that do not increase the facility's potential to emit by more than ~~15~~ 5 tons per year of any pollutant except:

(i) any construction or changed conditions of operation at a facility that would violate any condition in any statute, the facility's existing Montana air quality permit, ~~or~~ any applicable rule contained in this chapter, or the state implementation plan is prohibited, except as allowed in (2);

(ii) through (c) remain the same.

(d) If notice is required under (1)(b), the owner or operator shall submit the following information to the department in writing at least 10 days prior to ~~startup or use~~ construction of the proposed de minimis change or as soon as reasonably practicable in the event of an unanticipated circumstance causing the de minimis change:

(d)(i) through (e) remain the same.

(2) A Montana air quality permit may be amended pursuant to [NEW RULE XV], for changes made under (1)(a)(i) that would otherwise violate an existing condition in the permit. Conditions in the permit concerning emission limits or production limits in lieu of emission limits, control equipment specifications, operational procedures, or testing, monitoring, record keeping, or reporting requirements may be modified if the modification does not violate any statute, rule, including BACT/LAER requirements for major or minor sources, or the state implementation plan. ~~Conditions in the permit establishing emission limits, or production limits in lieu of emission limits, may be changed or added under (1)(a), if the owner or operator agrees to such changes or additions.~~

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ISSUE #6: Clarify or further define "shakedown procedures" in *New Rule VI(4)(i)* [New proposal by MEIC]

COMMENT: A commenter suggested that the Board define the term "shakedown procedures," used in New Rule VI(4)(i).

OPTION 1 - leave as proposed.

Response to comment: The board has not made this suggested revision. The Board does not believe that it is necessary to define "shakedown" procedures in New Rule VI(4)(i) because these procedures are described in each permit application.

SUPPORTS: DEQ

OPTION 2 – add language as suggested by commenter.

Response to comment: The Board agrees that the meaning of "shakedown procedures" in New Rule VI(4)(i) is unclear and should be further defined or clarified. ***[Commenter did not suggest specific language]***

RULE VI NEW OR MODIFIED EMITTING UNITS--PERMIT APPLICATION REQUIREMENTS (1) through (4)(h) remain the same.

(i) a description of shakedown procedures to the extent shakedown is expected to affect emissions, and the anticipated duration of the shakedown period for each new or modified emitting unit; ***[language would be added here]***

(j) through (7) remain the same.

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ISSUE #7: Consideration of past compliance *(New Rule VII(4))*

[included in 8/15/02 MAR notice #17-165]

COMMENTS: ***[Holland & Hart]*** A commenter stated that the following underlined language in New Rule VII(4) may create an ambiguity that could be construed to allow or even require the department to withhold or condition a permit based on prior compliance issues completely unrelated to the permit being issued: "The department shall issue a Montana air quality permit for the following unless the department demonstrates that the emitting unit does not operate or is not expected to operate in compliance with applicable rules, standards, or other requirements. The commenter stated that this issue was raised in a permit appeal a year ago based on similar language in ARM 17.8.710(4) and that the Department's position was that permitting and enforcement are separate functions and the Department could not condition or reject a permit based solely on past compliance issues. The hearing examiner in that appeal agreed, and deleting the language in question would clarify this issue.

[MEIC] Another commenter stated that the burden should not be on the Department to prove that an "emitting unit does not operate or is not expected to operate in compliance with applicable rules, standards, or other requirements." The burden should be placed on the owner or operator. The Department should not issue a permit unless the applicant proves that the emitting unit does operate in compliance with the rules, standards and other requirements. The commenter stated that deleting the language that allows the Department to consider a facility's failure to comply with air quality laws in the past would be shortsighted and potentially environmentally damaging. The Department would be remiss in its duties to maintain and improve a clean and healthful environment if it failed to look at a facility's compliance record. Past compliance could very well indicate the inability to comply in the future.

OPTION 1 - remove language.

Response to comments: The Board has deleted the language in question. Permitting and compliance are separate functions, and past compliance is not presently a factor in issuance of a new permit. The clarification is consistent with current implementation. The Department will still be required to determine whether the applicant has adequately demonstrated that the proposed new or altered emitting unit is expected to operate in compliance with applicable requirements.

SUPPORT: DEQ, Holland & Hart, MCA

RULE VII CONDITIONS FOR ISSUANCE OR DENIAL OF PERMIT (1) through (3) remain the same.

(4) The department shall issue a Montana air quality permit for the following unless the department demonstrates that the emitting unit ~~does not operate or~~ is not expected to operate in compliance with applicable rules, standards, or other requirements:

(5) through (8) remain the same.

OPTION 2 - leave as proposed.

Response to comments: The Board believes that it is appropriate to consider a facility's past compliance when issuing a permit for a new or altered emitting unit at the facility. Past noncompliance could very well indicate a facility's inability to comply in the future, and the Department

should not issue a permit unless the owner or operator proves that the emitting unit operates in compliance with air quality requirements.

SUPPORTS: MEIC

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ISSUE #8: Increase 15-day public comment period to 30 days *(New Rule XI)*

COMMENTS: ***[EPA]*** EPA commented that it is concerned that the rules would provide for only a 15-day public review of preliminary determinations on permits. This timeframe is too short for the public and EPA to provide comments, particularly for complex permitting actions.

EPA commented that it approved the existing 15-day comment period into the SIP over 20 years ago. Although EPA regulations normally require that SIPs include a 30-day comment period for permit actions, federal regulations (40 CFR 51.161(b) and (c)) provide discretion to approve a shorter comment period when existing state rules already included a comment period less than 30 days. EPA exercised this discretion in approving Montana's 15-day comment period. However, this short comment period has caused EPA problems on a number of occasions. EPA has found it difficult to adequately review and comment on the Department's preliminary permit determinations, particularly when complex issues have been involved or when EPA has had misunderstandings with the state. EPA stated that, given its own difficulties, EPA questions whether this comment period provides adequate opportunity for comment by other federal agencies, other affected states, and the public. EPA noted that, when the Board proposed revisions to the permitting rules on February 14, 2002, EPA expressed concerns regarding the 15-day comment period and asked that it be lengthened to 30 days.

EPA commented that it recently received a petition from Environmental Defense and Land and Water Fund of the Rockies that, among other things, alleges that the 15-day comment period is inadequate and demands that EPA issue a SIP call requiring the state to revise the comment period to at least 30 days. EPA stated that it has not made a decision yet regarding this request for a SIP call or any other aspect of the petition, but the current rulemaking offers an opportunity to resolve this concern.

EPA commented that it understands the 15-day comment period may be considered necessary due to the Montana statutory requirement that a final decision be made within 60 days after receipt of a complete permit application. EPA stated that it does not believe this time constraint should dictate the length of the public comment period because it is essential that adequate opportunity for public comment be provided regardless of state-imposed deadlines on permit issuance. EPA stated that it also questions whether 60 days is adequate to complete complex permitting actions. EPA stated that it's regulations (40 CFR 51.166(q)) require only that a preliminary determination on a PSD permit be issued within one year after receipt of a complete permit application, and EPA's experience indicates that permit applications often raise complex issues that require significantly more than 60 days to adequately address. EPA stated that it recognizes that a change to the 60-day period may require legislative action.

[Holland & Hart] Another commenter stated that the rules do not envision that EPA or members of the public wait until issuance of a preliminary determination before taking part in the permit process. As soon as an application for a permit is filed, the applicant must publish notice of the application. The application and any supporting documents are available to the public while the Department undertakes its completeness determination. If the public has concerns about the permit application then, they can share those concerns with the Department. By the time the preliminary determination is issued, forty days or more after the application is filed, interested parties should be very familiar with the issues raised by the permit. The commenter stated that, for these reasons, 15 days is a reasonable time within which to provide formal comments. The commenter also stated that the 15-day public comment period is a large issue that may require a legislative solution outside of the scope of this rulemaking. It should not be separated out and

changed without regard to the total permitting schedule. This is not the appropriate occasion for a selective change.

[MEIC] Another commenter stated that it objects to the excessively short 15-day public comment period on preliminary determinations for permits and the 15-day appeal period for a final decision. The commenter stated that it is clear that the federal PSD program requires a longer public comment period. A maximum of 15 days to comment on complex technical, legal and scientific aspects of permit applications is simply insufficient.

OPTION 1 - leave as proposed.

Response to comments: The Board has not made the suggested revision. 40 CFR 51.161(c) states that: "Where the 30-day comment period required in paragraph (b) of this section would conflict with existing requirements for acting on requests for permission to construct or modify, the State may submit for approval a comment period which is consistent with such existing requirements." The 15-day comment period in the proposed rule is the same as in the existing rule, which has been submitted to, and approved by, EPA. The preconstruction permitting process begins with submittal of an application and publication of a legal notice by the applicant. Notice of permit applications is placed on the Department's web site, providing additional opportunities for public participation. The Department has 30 days in which to determine whether an application is complete. If it is incomplete, the Department notifies the applicant, who must correct the deficiencies and resubmit the application, and the 30-day review period begins again. During the review periods, the public may submit comments to the Department. Following the 30-day completeness review period, the Department must issue its preliminary determination (PD) on the application. The PD is a draft permit that is available for comment during a period not to exceed 15 days from the date it is mailed. The PD is also available on the Department's web site. When the comment period has ended, the Department issues its final decision, which must be made within 60 days after the permit application was submitted. The decision is not final until 15 days have elapsed without a request for a hearing on the decision. If such a request is filed, the final decision is stayed until the conclusion of the hearing and the issuance of a final decision by the Board. The Board believes there is ample opportunity for public participation in the permitting process.

SUPPORT: DEQ, Holland & Hart, MCA, WETA

OPTION 2 – increase public comment period to 30 days.

Response to comments: The Board believes that the 15-day public comment period is too short for the public and EPA to provide comments, particularly for complex permitting actions, and the Board has revised the rule to provide a 30-day comment period.

SUPPORT: EPA, MEIC

RULE XI REVIEW OF PERMIT APPLICATIONS (1) through (3) remain the same.

(4) After making a preliminary determination, the department shall notify those members of the public who requested such notification subsequent to the notice required by [NEW RULE VI] and the applicant of the department's preliminary determination. The notice must specify that comments may be submitted on the information submitted by the applicant and on the department's preliminary determination. The notice must also specify the following:

(a) that a complete copy of the application and the department's analysis of the application is available from the department and in the air quality control region where the emitting unit is located;

(b) the date by which all comments on the preliminary determination must be submitted in writing, which must be within ~~15~~ 30 days after the notice is mailed; and

(c) through (5) remain the same.

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OTHER ISSUES - EPA COMMENTS

ISSUE #9: Change from "shall" to "may" in the BACT definition *(New Rule II(1))*

COMMENTS: EPA commented that the change from "shall" to "may" in the BACT definition ***(New Rule II(1))*** is inconsistent with the federal definition of BACT (40 CFR 51.166(b)(12)), and appears to be a relaxation of existing rules in the SIP. EPA stated that this could be addressed by revising the rule to indicate that it does not apply to major source permitting.

Other commenters expressed general opposition to adding language stating that this definition does not apply to other subchapters.

OPTION 1 – leave as proposed.

Response to comments: The Board has not made the suggested revision. The language was changed to conform to Montana's current bill-drafting requirements, and was not intended to change the meaning of, or relax, existing rules in the SIP. New Rule II explicitly states that the definitions contained in that rule are "for the purposes of this subchapter."

SUPPORT: DEQ, Holland & Hart, MCA, WETA

OPTION 2 – revise as suggested by EPA.

Response to comments: The Board agrees and has added language to the definition of BACT in New Rule II(1) to clearly indicate that the definition applies only to subchapter 7 of the rules.

SUPPORTS: EPA

RULE II DEFINITIONS For the purposes of this subchapter: (1) "Best available control technology (BACT)" means an emission limitation (including a visible emission standard), based on the maximum degree of reduction for each pollutant subject to regulation under 42 U.S.C. 7410, et seq. or 75-2-101, et seq., MCA, that would be emitted from any proposed emitting unit or modification which the department, on a case-by-case basis, taking into account energy, environmental, and economic impacts and other costs, determines is achievable for such emitting unit or modification through application of production processes or available methods, systems, and techniques, including fuel cleaning or treatment or innovative fuel combustion techniques for control of such contaminant. In no event may application of BACT result in emission of any regulated air pollutant that would exceed the emissions allowed by any applicable standard under ARM Title 17, chapter 8, subchapter 3, and this subchapter. If the department determines that technological or economic limitations on the application of measurement methodology to a particular class of emitting units would make the imposition of an emission standard infeasible, it may instead prescribe a design, equipment, work practice, or operational standard or combination thereof, to require the application of BACT. Such standard must, to the degree possible, set forth the emission reduction achievable by implementation of such design, equipment, work practice or operation and must provide for compliance by means that achieve equivalent results. This definition applies only to this subchapter and is not intended to apply to ARM Title 17, chapter 8, subchapters 8, 9, and 10.

(2) through (15) remain the same.

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ISSUE #10: Definition of "construct" or "construction" *(New Rule II(2))*

COMMENTS: EPA commented that the new rules do not clearly indicate how they apply to major source permitting. The definition of **"c**onstruct" or "construction" in New Rule II(2)includes the phrase "a reasonable period of time for startup and shakedown." Because of this phrase, New Rule II(2) is not consistent with the same term used in major source permitting. EPA commented that the Board should revise this definition to indicate that it does not apply to sources subject to subchapters 8, 9 or 10.

Other commenters expressed general opposition to adding language stating that this definition does not apply to other subchapters.

OPTION 1 – add language.

Response to comments: The Board agrees and has added language to New Rule II(2) to clarify that the definition of "construct" or "construction" applies only to subchapter 7 and not to subchapters 8, 9 or 10.

SUPPORT: DEQ, EPA, MEIC

RULE II DEFINITIONS For the purposes of this subchapter: (1) remains the same.
(2) "Construct" or "construction" includes a reasonable period of time for startup and shakedown and means:
(a) initiation of on-site fabrication, erection, or installation of an emitting unit or control equipment including, but not limited to:
(i) installation of building supports or foundations;
(ii) laying of underground pipework; or
(iii)construction of storage structures; or
(b) the installation of any portable or temporary equipment or facilities.
(c) This definition applies only to this subchapter and is not intended to apply to ARM Title 17, chapter 8, subchapters 8, 9, and 10.
(3) through (15) remain the same.

OPTION 2 - leave as proposed.
Response to comments: The Board has not made the suggested revision. New Rule II explicitly states that the definitions contained in that rule are "for the purposes of this subchapter". Therefore, the definition of "construct" or "construction" would not apply to subchapters 8, 9 or 10, and the additional language is unnecessary.
SUPPORT: Holland & Hart, MCA, WETA

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ISSUE #11: Definition of "facility" *(New Rule II(6))*

COMMENTS: EPA commented that, in the definition of "facility" in New Rule II(6), the phrase "that contributes or would contribute to air pollution" may not be as restrictive as the phrase "that emits or has the potential to emit air pollution." EPA stated that someone may emit air pollution but believe they do not contribute to air pollution. Therefore, the phrase "that contributes or would contribute to air pollution" should be replaced with "that emits or has the potential to emit air pollution."
Another commenter agreed with EPA, stating that the phrase "that contributes or would contribute to air pollution" is a far more subjective determination than the original language, "that emits or has the potential to emit."

OPTION 1 – change language as suggested by EPA.
Response to comments: The Board agrees that a facility should be regulated if it has the potential to emit air pollution, even if it does not cause or contribute to air pollution.
SUPPORT: DEQ, EPA, MEIC

RULE II DEFINITIONS For the purposes of this subchapter: (1) through (5) remain the same.
(6) "Facility" means any real or personal property that is either stationary or portable and is located on one or more contiguous or adjacent properties under the control of the same owner or operator ~~that contributes or would contribute to air pollution,~~ and that emits or has the potential to emit any air pollutant subject to regulation under the Clean Air Act of Montana or the Federal Clean Air Act, including associated control equipment that affects or would affect the nature, character, composition, amount, or environmental impacts of air pollution and that has the same two-digit standard industrial classification code. A facility may consist of one or more emitting units.
(7) through (15) remain the same.

OPTION 2 - leave as proposed.
Response to comments: The Board does not agree that the language in New Rule II(6) is less restrictive than the language suggested by EPA, and the Board has not made the suggested revision.
SUPPORT: Holland & Hart, MCA, WETA

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ISSUE #12: Definition of "routine maintenance, repair, or replacement" *(New Rule II(14))*

COMMENTS: ***[EPA]*** EPA commented that, in New Rule II(14), the definition of "routine maintenance, repair, or replacement", does not clearly indicate how it applies to major source permitting. EPA commented that, for major source permitting, determining whether an action constitutes routine maintenance, repair, or replacement is case-specific and the term cannot be generally defined. Based on past determinations, routine activity has a narrow scope and, generally, applies only to actions that are regular, customary, and repetitious and undertaken as standard practice to maintain a facility in its present condition. The determination of whether a proposed modification is "routine" must take into consideration the nature, extent, purpose, frequency and cost of the work, as well as any other relevant factors. EPA commented that the proposed definition for "routine maintenance, repair, or replacement" would not assure that all appropriate factors are considered, and the definition should be revised to indicate that it does not apply to sources subject to subchapters 8, 9 or 10.

[MEIC] Another commenter agreed with EPA's comments, stating that this should be a narrowly-defined provision where determinations are made on a case-by-case basis.

[Holland & Hart] Another commenter stated that EPA's suggested language should not be included. The commenter stated that the definition is not mutually exclusive with a case-by-case review, and that the definition would provide specific guidance while still allowing flexibility for a case-by-case determination. The commenter stated that, under EPA's approach, an action might clearly be "routine maintenance," as defined under subchapter 7, but be considered a modification requiring a PSD or nonattainment area NSR permit under subchapters 8 through 10.

OPTION 1 – change language as suggested.

Response to comments: The Board agrees that routine maintenance, repair and replacement should be interpreted on a case-by-case basis, and the Board has revised New Rule II(14) as suggested by EPA.

SUPPORT: DEQ, EPA, MEIC

RULE II DEFINITIONS For the purposes of this subchapter: (1) through (13) remain the same.

(14) "Routine maintenance, repair, or replacement" means any action taken upon an emitting unit by the owner or operator that is necessary on a periodic basis to assure proper operation of the emitting unit.

(a) The term routine does not include activities that:

~~(a)~~ (i) have associated fixed capital costs in excess of 50% of the fixed capital cost necessary to construct a comparable, entirely new emitting unit;

~~(b)~~ (ii) change the design of the emitting unit, including associated control equipment; or

~~(c)~~ (iii) increase the potential to emit of the emitting unit.

(b) This definition applies only to this subchapter and is not intended to apply to ARM Title 17, chapter 8, subchapters 8, 9, and 10.

(15) remains the same.

OPTION 2 - leave as proposed.

Response to comments: The Board has not made the suggested revision. New Rule II explicitly states that the definitions contained in that rule are "for the purposes of this subchapter". Therefore, the definition of "routine maintenance, repair, or replacement" would not apply to subchapters 8, 9 or 10. If there was an express provision in subchapters 8, 9, or 10 that was different from the provisions of subchapter 7, the suggested additional clause might be appropriate. However, there is no contrary provision, and the suggested language is not necessary.

SUPPORT: Holland & Hart, MCA, WETA

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ISSUE #13: Increasing 5 tons to 15 tons of emissions for asphalt concrete plants ... *(New Rule III(1)(b))*

COMMENT: EPA commented in opposition to New Rule III(1)(b), which would exclude from the permit requirement asphalt concrete plants, mineral crushers and mineral screens that have the potential to emit more than 15 tons per year of any airborne pollutant, other than lead, regulated under the air quality rules. EPA commented that the existing ARM 17.8.705(1)(o) requires a permit for these same sources when they have the potential to emit more than 5 tons per year, and that the proposed new rule would be a relaxation of the existing SIP.

OPTION 1 - leave as proposed.

Response to comment: The Board has not made the suggested revision. The new rule is intended to make the requirement consistent with the other permitting thresholds in the subchapter and is more stringent than federal requirements. The asphalt concrete plants, mineral crushers, and mineral screens currently being permitted will still require an air quality permit. Therefore, the number of these facilities required to obtain permits will not be fewer. Also, this rule is more stringent than the previous, EPA-approved rule, because the permitting threshold for mineral screening operations has been lowered from 25 tons per year to 15 tons per year.

SUPPORT: DEQ

OPTION 2 – revert to original language.

Response to comment: The Board agrees that an air quality permit should be required for asphalt concrete plants, mineral crushers, and mineral screens with the potential to emit 5 tons per year or more, and the Board has made the suggested revision.

SUPPORTS: EPA

RULE III MONTANA AIR QUALITY PERMITS--WHEN REQUIRED (1) Except as provided in [NEW RULE IV and V], a person may not construct, install, modify, or operate any of the following without first obtaining a Montana air quality permit issued by the department:

(a) remains the same.

(b) asphalt concrete plants, mineral crushers, and mineral screens that have the potential to emit more than ~~15~~ 5 tons per year of any airborne pollutant, other than lead, that is regulated under this chapter;

(c) through (5) remain the same.

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ISSUE #14: General exclusion for emergency equipment *(New Rule IV(1)(f))*

COMMENTS: EPA commented that New Rule IV(1)(f), a general exclusion from permitting for emergency equipment installed in industrial or commercial facilities, does not clearly indicate how it applies to major source permitting. EPA commented that, because there would not be any restrictions on size or emissions or the duration of time emergency equipment could be used, emergency equipment excluded from permitting in subchapter 7 could be a major source subject to major source permitting. EPA commented that this exclusion should be revised to indicate that it does not apply to sources subject to subchapters 8, 9 or 10.

Other commenters expressed general opposition to adding language stating that this exclusion does not apply to other subchapters.

Another commenter agreed with EPA's comments, stating that there should be limitations on the size, emissions and duration of time emergency equipment is used.

OPTION 1 – change language as suggested.

Response to comments: The Board agrees that the rule should state that the exclusion from permitting for emergency equipment does not exempt the

equipment from meeting the requirements of subchapters 8, 9 or 10, if applicable.

SUPPORT: DEQ, EPA, MEIC

RULE IV MONTANA AIR QUALITY PERMITS--GENERAL EXCLUSIONS

(1) A Montana air quality permit is not required under [NEW RULE III] for the following:

(a) through (e) remain the same.

(f) emergency equipment installed in industrial or commercial facilities for use when the usual sources of heat, power, or lighting are temporarily unobtainable or unavailable and when the loss of heat, power, or lighting causes, or is likely to cause, an adverse effect on public health or facility safety. Emergency equipment use extends only to those uses that alleviate such adverse effects on public health or facility safety. A permit is not required for emergency equipment as long as the facility was unable to reasonably predict the event that caused the emergency~~.~~. This exclusion does not exempt any facility from complying with applicable rules in ARM Title 17, chapter 8, subchapters 8, 9, and 10;

(g) through (k) remain the same.

OPTION 2 - leave as proposed.

Response to comments: The Board has not made the suggested revision. The exclusion for emergency equipment is merely a clarification of the existing rule, which has been approved by EPA. This exclusion applies only when it is necessary to use emergency equipment to alleviate threats to public health or facility safety, and emissions from emergency equipment would not adversely effect the environment.

SUPPORT: Holland & Hart, MCA, WETA

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ISSUE #15: Provisions allowing 5-year extension of effective date in permit or 3-year upper limit on expiration date of a permit *(New Rules VII(2) and XIII(2))*

COMMENTS: EPA commented that New Rules VII(2) and XIII(2), which would allow for a 5-year extension of the specified effective date for a permit or a 3-year upper limit on the expiration date of a permit when construction or installation has not occurred, respectively, would not clearly indicate how they apply to major source permitting and would be inconsistent with requirements for major source permitting. EPA commented that PSD requirements in 40 CFR 52.21(r)(2) specify that a PSD permit expires after 18 months and that New Rules VII(2) and XIII(2) should be revised to indicate that they do not apply to sources subject to subchapters 8, 9 or 10.

Another commenter expressed general agreement with EPA's comments.

Other commenters expressed general opposition to adding language stating that these provisions do not apply to other subchapters.

OPTION 1 - add language to New Rules VII and XIII to clarify that these provisions apply only to subchapter 7 and not to subchapters 8, 9 or 10.

Response to comments: The Board agrees and has made the suggested revisions.

SUPPORT: DEQ, EPA, MEIC

RULE VII CONDITIONS FOR ISSUANCE OR DENIAL OF PERMIT (1) through (8) remain the same.

(9) These provisions apply only to this subchapter and are not intended to apply to ARM Title 17, chapter 8, subchapters 8, 9, and 10.

RULE XIII DURATION OF PERMIT (1) and (2) remain the same.

(3) These provisions apply only to this subchapter and are not intended to apply to ARM Title 17, chapter 8, subchapters 8, 9, and 10.

OPTION 2 - leave as proposed.

Response to comments: The Board has not made the suggested revision. The Department requires an updated BACT analysis and any other appropriate analysis before extending or reissuing a permit. The one-year to three-year construction commencement requirement in New Rule XII(2) is sufficient to implement Montana's BACT requirement for minor sources. ARM 17.8.819 contains requirements applicable to BACT determinations for PSD permits that are sufficient to meet the requirements of 40 CFR 52.21(r)(2) and 51.166(j)(4). The rules have been made more stringent by adding the three-year time limit for commencement of construction. This will not replace PSD requirements for PSD sources (i.e., the 18-month limit applies to PSD sources but not to non-PSD sources).

SUPPORT: Holland & Hart, MCA, WETA

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ISSUE #16: "State-only" conditions in permits *(New Rule VII(5))*

COMMENTS: ***[EPA]*** EPA commented in opposition to New Rule VII(5), which would provide for identification of "state-only" conditions in a Montana air quality permit that would not be federally enforceable. EPA commented that, currently, terms in permits issued under a SIP-approved permit program (e.g., permits issued under subchapter 7) are federally enforceable. EPA commented that, before it could approve this provision, a justification as to why certain provisions do not warrant federal (and citizen) review and enforceability would need to be submitted with the rule revision. EPA commented that the state should also demonstrate in the submittal that the proposed state-only terms would not hamper the ability of the state to enforce the SIP-approved aspects of NSR permits. EPA questioned the types of provisions the state would consider as being not federally enforceable, and EPA stated that, without more details on how this particular change would be implemented, EPA has potential backsliding concerns under Section 110(1) of the Federal Clean Air Act.

[Holland & Hart] Another commenter stated that, when the Department issues an operating permit to a major source, it identifies the rules that are "state-only" and that are not federally enforceable. The commenter stated that these are rules that the state has adopted of its own accord, that are not subject to EPA interpretation, guidance, or oversight, and that are not included in the SIP. The proposed rules would include a provision similar to that currently found in the operating permit rules whereby the Department specifically identifies state-only rules in the permit. These are rules adopted by the state that do not require federal approval and that are not necessary for federal approval of the state's program, so these rules should be enforceable only at the state level. The commenter stated that Montana could have adopted a completely separate permitting program for state-only rules, and that such a permitting program would not be subject to EPA approval. However, requiring applicants to secure another permit for state-only permits would be undesirable and would not be an efficient approach to the permitting process.

OPTION 1 – leave as proposed.

Response to comments: The Board has not made the suggested revision. The Board has adopted certain requirements that are more stringent than federal requirements and that are designed to protect Montana's environment by addressing its own unique needs. These rules are not intended to be part of the SIP and intentionally have not been submitted to EPA for inclusion in the SIP. State standards that are stricter than federal standards do not compromise the integrity of the SIP, and "backsliding" will not occur. The Board does not believe it is necessary to adopt a separate permitting program for these conditions, and believes it is appropriate to place them in air quality permits issued by the Department. During the permitting process, EPA and other concerned persons will have the opportunity to ensure that the Department correctly applies the state-only designation.

SUPPORT: DEQ, Holland & Hart, MCA, WETA

OPTION 2 – Remove language.

Response to comments: The Board agrees with EPA's concern that the proposed state-only permit terms might hamper the state's ability to enforce the SIP-approved aspects of its permits, and the Board has deleted the provision.

SUPPORTS: EPA

RULE VII CONDITIONS FOR ISSUANCE OR DENIAL OF PERMIT (1) through (4) remain the same.

~~(5) In a Montana air quality permit, the department shall identify those conditions that are derived from state law, and are not derived from the Federal Clean Air Act, 42 U.S.C. 7401, et seq., the Montana state implementation plan, or other federal air quality requirements. Compliance with these conditions is not required by the state implementation plan, and is not necessary for attainment or maintenance of federal ambient air quality standards. These conditions must be identified in the permit as "state-only," and are not intended by the department to be enforceable under federal law.~~

(6) through (8) remain the same.

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ISSUE #17: Revocation of "any portion of a permit" (*New Rule XIV(1)*)

COMMENTS: EPA commented that, under New Rule XIV, which would allow the Department to "revoke a permit or any portion of a permit upon written request of the permittee . . ." applicable provisions might be inadvertently revoked at the request of the permittee. EPA commented that the proposed rule should be revised to indicate that permittee-initiated revocations can be approved only if the provisions to be revoked are not applicable requirements of subchapters 7, 8, 9 or 10.

Other commenters expressed general opposition to adding language stating that this provision does not apply to other subchapters.

OPTION 1 - add language to indicate that provisions revoked are not applicable requirements of subchapters 8, 9 or 10.

Response to comments: The Board agrees and has made the suggested revision.

SUPPORT: DEQ, EPA

RULE XIV REVOCATION OF PERMIT (1) The department may revoke a Montana air quality permit or any portion of a permit upon written request of the permittee, if revocation will not violate any requirement of ARM Title 17, chapter 8, subchapters 8, 9, and 10; or for violation of any requirement of the Clean Air Act of Montana, rules adopted under that Act, the Federal Clean Air Act and ~~rules~~ regulations promulgated under that Act (as incorporated by reference in [NEW RULE XVII]), or any applicable requirement contained in the Montana state implementation plan (as incorporated by reference in [NEW RULE XVII]).

(2) through (5) remain the same.

OPTION 2 - leave as proposed.

Response to comments: The Board has not made the suggested revision. It is appropriate to revoke portions of permits that are no longer applicable due to changing conditions at the facility. While some portion of a permit may be revoked, the permit as a whole still must meet any underlying applicable regulations. Also, unless partial revocation meets the requirements for an administrative amendment, the Department will be required to follow the procedures for new permits or permit modifications.

SUPPORT: Holland & Hart, MCA, WETA

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ISSUE #18: Public review requirements for administrative amendments to permits *(New Rule XV(1))*

COMMENTS: EPA commented that, although New Rule XV(1)(b) would allow administrative amendments to permits only when there is no increase in emissions, EPA is concerned that some administrative permit amendments should be subject to public review. Concerning amendments that would not affect emission limits, EPA suggested revising the rule to indicate that the Department may make an administrative amendment " . . . provided the amendment does not violate any requirement of an applicable statute, rule or State Implementation Plan or effect the enforceability of an emissions limit . . . ." EPA commented that changes could effect the enforceability of an emissions limit, for example, changes in testing and monitoring methods, frequency of testing, and reporting requirements. EPA commented that it also suggests public review requirements for administrative amendments that result in decreases in emissions. EPA commented that any amendment that decreases an emission limit, for example, to create a synthetic minor source or to avoid other requirements, should go through public review for the limit to be federally enforceable.

Other commenters expressed general opposition to adding language stating that this provision does not apply to other subchapters.

OPTION 1 - add language to New Rule XV(1) to clarify that administrative amendments may not violate any requirements of subchapters 8, 9, or 10.

Response to comments: The Board agrees that the rule should state that administrative amendments may not violate any requirements of subchapters 8, 9, or 10, and the Board has made this suggested revision.

SUPPORTS: DEQ

RULE XV ADMINISTRATIVE AMENDMENT TO PERMIT (1) The department may amend a Montana air quality permit, or any portion of a permit, for the following reasons, if the amendment does not violate any requirement of ARM Title 17, chapter 8, subchapters 8, 9, or 10:

(a) through (4) remain the same.

OPTION 2 - add EPA's suggested language.

Response to comments: The Board agrees that, even though there may not be any increase in emissions, certain permit amendments should receive public review in order for the limits to be federally enforceable, and the Board has made this suggested revision.

RULE XV ADMINISTRATIVE AMENDMENT TO PERMIT (1) The department may amend a Montana air quality permit, or any portion of a permit, provided the amendment does not violate any requirement of an applicable statute, rule or State Implementation Plan or effect the enforceability of an emissions limit, for the following reasons:

(a) through (4) remain the same.

Note: The commenter did not provide language for requiring public review.

OPTION 3 - leave as proposed.

Response to comments: The Board has not made the suggested revisions. The language in the proposed rule is the same as in the current, EPA-approved, rule. It is not necessary to grant EPA or the public appeal rights for administrative amendments that have no substantive effects on the permit or the environment. If EPA or the public believe they have been substantively affected by the Department's action on an administrative amendment, they have judicial remedies.

SUPPORT: Holland & Hart, MCA, WETA

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ISSUE #19: Permit transfer of location *(New Rule XVI(3))*

COMMENT: EPA commented that, under New Rule XVI(3), which would allow transfer of ownership and/or location of a permit if the Department does not approve, conditionally approve, or deny the transfer within 30 days after

receipt of a notice of intent to transfer, a source may inappropriately relocate in an area that would jeopardize attainment of the NAAQS. EPA commented that the rule should be revised to read that the transfer would be deemed approved "except for transfers of locations to areas where a source could cause or contribute to violations of the NAAQS."

OPTION 1 - add language.

Response to comment: The Board agrees and has made the suggested revision.

SUPPORT: DEQ, EPA

RULE XVI TRANSFER OF PERMIT (1) and (2) remain the same.

(3) The department may not approve or conditionally approve a permit transfer if approval would result in a violation of the Clean Air Act of Montana or rules adopted under that Act, including the ambient air quality standards. If the department does not approve, conditionally approve, or deny a permit transfer within 30 days after receipt of a complete notice of intent to transfer, as described in (1)(a) or (2), the transfer is deemed approved, except for transfers of a permit to areas where a source could cause or contribute to violations of the NAAQS.

OPTION 2 - leave as proposed.

Response to comment: The Board has not made the suggested revision. Permits for portable sources are written in such a manner as to comply with applicable requirements regardless of location of the source. Because no substantive requirements are involved, approval of a permit transfer is not necessary.

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ISSUE #20: Editorial comments.

COMMENTS: EPA submitted the following suggested minor clerical amendments:

Comment 1: In New Rule II(8)(a) and (c), the reference to New Rule IV should be to New Rule V.

Comment 2: In New Rule II(8)(b), the reference to New Rule II should be to New Rule III.

Comment 3: In New Rule IV(1)(j), the reference to ARM 17.8.110(7) should be to ARM 17.8.110(7) through (9).

Comment 4: In ARM 17.8.110(9), the reference to (7)(a) should be to (7)(a) and (b).

Comment 5: In ARM 17.8.818 and 17.8.1004, the references to New Rule IV should be to New Rule IV and V.

Comment 6: In ARM 17.8.1004, the Board proposed to delete two references to ARM 17.8.710. One of the references to ARM 17.8.710 should be to ARM 17.8.720.

Response to comments: The Board agrees and has made the suggested revisions. However, in response to comment 4, the Board has changed the reference in ARM 17.8.110(9) from (7)(a) to (7) rather than to (7)(a) and (b)as suggested.

(1) and (2)

RULE II DEFINITIONS (1) through (7) remain the same.

(8) "Modify" does not include routine maintenance, repair, or replacement but means:

(a) construction or changes in operation at a facility or emitting unit for which the department has issued a Montana air quality permit under this chapter, except when a permit is not required under [NEW RULE ~~IV~~ V];

(b) construction or changes in operation at a facility or emitting unit for which a Montana air quality permit has not been issued under this chapter but that subjects the facility or emitting unit to the requirements of [NEW RULE ~~II~~ III];

(c) construction or changes in operation at a facility or emitting unit that would violate any condition in the facility's Montana air quality permit, any board or court order, any control plan within the Montana state implementation plan, or any rule in this chapter, except as provided in [NEW RULE ~~IV~~ V];

(d) through (15) remain the same.

(3)

RULE IV MONTANA AIR QUALITY PERMITS--GENERAL EXCLUSIONS (1) through (i) remain the same.

(j) temporary process or emission control equipment, replacing malfunctioning process or emission control equipment, and meeting the requirements of ARM 17.8.110(7) through (9); or

(k) remains the same.

(4)

17.8.110 MALFUNCTIONS (1) through ~~(b)~~ (8) remain the same.

~~(c)~~ (9) Any source that constructs, installs, or uses temporary replacement equipment under ~~(a) above~~ (7) shall comply with the following conditions:

(i) through (iv) remain the same, but are renumbered (a) through (d).

(e) remains the same.

(5) and (6)

17.8.818 REVIEW OF MAJOR STATIONARY SOURCES AND MAJOR MODIFICATIONS--SOURCE APPLICABILITY AND EXEMPTIONS (1) No major stationary source or major modification shall begin actual construction unless, as a minimum, requirements contained in ARM 17.8.819 through 17.8.827 have been met. A major stationary source or major modification exempted from the requirements of subchapter 7 under ~~ARM 17.8.705(1)~~ [NEW RULE IV or NEW RULE V] shall, if applicable, still be required to obtain ~~an~~ a Montana air quality ~~preconstruction~~ permit and comply with all applicable requirements of this subchapter

(2) through (7) remain the same.

17.8.1004 WHEN MONTANA AIR QUALITY ~~PRECONSTRUCTION~~ PERMIT REQUIRED (1) Any new major stationary source or major modification which would locate anywhere in an area designated as attainment or unclassified for a national ambient air quality standard under 40 CFR 81.327 and which would cause or contribute to a violation of a national ambient air quality standard for any pollutant at any locality that does not or would not meet the national ambient air quality standard for that pollutant, shall obtain from the department ~~an~~ a Montana air quality ~~preconstruction~~ permit prior to construction in accordance with subchapters 7 and 8 and all requirements contained in this subchapter if applicable. A major stationary source or major modification exempted from the requirements of subchapter 7 under ~~ARM 17.8.705(1)~~ [NEW RULE IV or NEW RULE V] which would locate anywhere in an area designated as attainment or unclassified for a national ambient air quality standard under 40 CFR 81.327 and which would cause or contribute to a violation of a national ambient air quality standard for any pollutant at any locality that does not or would not meet the national ambient air quality standard for that pollutant, shall, prior to construction, still be required to obtain ~~an~~ a Montana air quality ~~preconstruction~~ permit and comply with the requirements of ~~ARM 17.8.706, 17.8.710, and 17.8.710~~ ~~17.8.720~~, [NEW RULES VI, VII, X, XI and XII], and ~~all~~ any other applicable requirements of this subchapter.

(2) remains the same.